

SUBJECT: Authorizing use of in-house counsel by Texas Banking Department

COMMITTEE: Investments and Banking — favorable, without amendment

VOTE: 6 ayes — Marchant, Gutierrez, Patterson, Price, Romo, D. Smith
0 nays
5 absent — Hudson, Carona, Giddings, Haggerty, McCoulskey

WITNESSES: For — (Registered only — Christopher Williston, Independent Bankers Association of Texas; Robert Harris, Texas Bankers Association)
Against — None
On — Catherine Ghiglieri, commissioner, Texas Department of Banking.
(Registered only — Ann Graham, Texas Department of Banking)

BACKGROUND: Article 5 of SB 3, by Montford et al. (72nd Legislature, first called session) directed the Office of the Attorney General (OAG) to consolidate within the office most legal services for executive branch agencies by September 1, 1992. Article 5 specifically exempted from consolidation almost two dozen state agencies and organizational entities, ranging from the Governor's Office and other agencies directed by elected or appointed officials to the departments of public safety, parks and wildlife and insurance.

DIGEST: HB 1773 would include the Texas Department of Banking in the list of agencies exempt from the consolidation of legal services under the OAG.

SUPPORTERS SAY: In the last decade, banking law at both the state and federal levels has become increasingly complex. Understanding the industry, the dual banking system and the interplay of state and federal banking laws, as well as the role and authority of federal banking regulatory agencies, makes banking law a highly specialized area of practice. Turning over the Banking Department's legal services to the OAG would seriously compromise the department's ability to respond promptly, effectively and decisively in the important area of banking oversight and regulation. Texas

banks have just emerged from an era of serious instability; there is serious danger in weakening the department's ability to help state banks regroup.

With consolidation of legal counsel comes prioritization of legal needs. History has shown that the banking industry is subject to unique and often unpredictable crises of an overwhelming magnitude. The state should not be placed in a position where it is unable to swiftly discharge its regulatory responsibilities simply because the banking department is not at the head of the line for legal services on a given day.

Thwarting the department's ability to discharge its duties also could negatively affect its relationship with federal banking regulators to the detriment of state banks. The department now shares examination duties and regulatory responsibilities for state-chartered banks with the Federal Deposit Insurance Corporation, thereby minimizing the regulatory burden on local institutions. The department would lose credibility with FDIC if a lack of legal counsel caused any failure to take action. This could result in severing the cooperative arrangement, increasing the regulatory burden on state-chartered banks. Many of these banks would probably opt to convert to a federal charter to avoid dual examinations, and Texas would lose the ability to control banking within its borders.

OPPONENTS
SAY:

The OAG already has denied the Banking Department's request for exemption, as well as those of dozens of other agencies; this bill would attempt an end run around that decision. According to the OAG's December 1992 report on the status of Article 5 implementation, "each agency considers itself to be unique, and almost every agency has requested an exemption even though its functions and legal needs in most cases are similar to those of other functionally similar agencies."

So far, only nine eligible agencies, primarily those already making extensive use of outside counsel, have acquiesced to consolidation of their legal counsel. In a September 1 update on consolidation efforts, the OAG reported that "a number of agencies have already informed us that they will not cooperate with our program . . . explicitly or implicitly, the agencies feel that by delaying implementation into the next regular session of the legislature, they will be successful in obtaining legislative relief from

SB 3." In fact, HB 1773 is just one in a series of such legislative maneuvers: SB 118 by Henderson, exempting the State Securities Board, already has been signed into law by the governor, while several other bills would chip away the consolidation plan agency-by-agency.

Consolidation of state legal services within the OAG was a cost-saving recommendation of the 1991 *Breaking the Mold* report issued by the Texas Performance Review. An overly decentralized system makes it difficult for attorneys employed by various state agencies to take a consistent legal position on behalf of the state. Legal libraries and computerized legal research services are needlessly duplicated when each agency has its own set of lawyers.

The consolidation plan devised by the OAG ensures both continuity and efficiency of services: current staff attorneys would remain on-site, providing their usual services, while gradually assuming responsibility for representing their client in specialized areas previously reserved for the OAG, including administrative appeals, rulemaking challenges and declaratory judgment actions in district and appellate courts. Eventually, under the space consolidation plan of the General Services Commission, counsel for functionally similar agencies would be located in OAG "satellite" legal offices within the office complexes of the agencies they serve.

The OAG plan provides sufficient flexibility for the banking department and other regulatory agencies to have direct access to legal counsel with the required expertise. Allowing agencies to circumvent Article 5 piecemeal, with each retaining separate, duplicative corps of attorneys, is an unnecessary luxury that the state can no longer afford.

NOTES:

SB 877 by Montford, which would repeal the Article 5 consolidation of state legal services, passed the Senate on April 19 and has been referred to the House State Affairs Committee. Other bills that would exempt agencies from consolidation of legal services under the OAG include HB 1501 by Naishtat, exempting the Texas School for the Deaf and the Texas School for the Blind and Visually Impaired, which is now before the Local and Consent Calendars Committee, SB 519 by C. Harris (the Texas Alcoholic

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Beverage Commission) and SB 626 by Sibley (the Texas National Research Laboratory Commission). Both bills have been referred to Senate committees.